

# EXHIBIT 60

Scully, Thomas A.

May 15, 2007

Washington, DC

Page 1

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

- - - - - - - - - - - - - - -x

IN RE: PHARMACEUTICAL : MDL NO. 1456  
INDUSTRY AVERAGE WHOLESALE : CIVIL ACTION  
PRICE LITIGATION : 01-CV-12257-PBS  
THIS DOCUMENT RELATES TO :  
U.S. ex rel. Ven-a-Care of : Judge Patti B. Saris  
the Florida Keys, Inc. :  
v. :  
Abbott Laboratories, Inc., : Chief Magistrate  
No. 06-CV-11337-PBS : Judge Marianne B.

- - - - - - - - - - - - - - -x Bowler

Henderson Legal Services  
202-220-4158

Scully, Thomas A.

May 15, 2007

Washington, DC

| Page 50  | Page 52  |
|--|--|
| <p>1 Administration. And not planning to go back into the<br/>     2 government, but I ran into Secretary Thompson or<br/>     3 something, and a mutual friend had recommended that<br/>     4 he encourage me to do this. So it was largely<br/>     5 through Secretary Thompson. And since I had a long<br/>     6 history with the Bush Administration, hopefully I was<br/>     7 an acceptable choice to the White House.</p> <p>8 Q. And you stayed there until -- you stayed<br/>     9 as administrator of HCFA and CMS, which was one of<br/>     10 the first things you did was to change the name,<br/>     11 until what, the end of --</p> <p>12 A. Technically, it was January 4th of 2004,<br/>     13 was my technically last day.</p> <p>14 Q. Will you mark this? This will be 181, I<br/>     15 believe. Exhibit Abbott 181.</p> <p>16 MS. MILLER: Mary Miller on behalf of the<br/>     17 Florida Attorney General's office. Florida reserves<br/>     18 the right to strike all testimony relating to<br/>     19 documents used as exhibits here today with respect to<br/>     20 the Mylan case and cross-noticed case, due to failure<br/>     21 to produce said documents based on properly served<br/>     22 request for production of documents.</p> | <p>1 objecting to a document that the Mylan defendants did<br/>     2 not give you that came from the government?</p> <p>3 MS. MILLER: That we had properly served.<br/>     4 It's to the extent that it should have been produced<br/>     5 to document requests properly served on the<br/>     6 defendants in the cross-noticed case. We reserve<br/>     7 that right. I just wanted to clarify what my<br/>     8 objection was, so the Abbott counsel was clear about<br/>     9 this.</p> <p>10 MR. BREEN: Just so the record is clear,<br/>     11 in the Florida ex rel Ven-a-Care Mylan action, the<br/>     12 state has requested documents from Mylan. And Mylan<br/>     13 has objected, I believe, to the lack of a protective<br/>     14 order or something at this point in time. And I<br/>     15 believe the AG's objection is simply that if any of<br/>     16 those documents are used in this deposition today,<br/>     17 with respect to the deposition is used in the Mylan<br/>     18 case, Florida is objecting. It's that simple, right,<br/>     19 Mary?</p> <p>20 MS. MILLER: Yes. It is that simple.</p> <p>21 Thank you.</p> <p>22 MR. GOBENA: The only subpoena we received</p> |
| Page 51  | Page 53  |
| <p>1 (Exhibit Abbott 181 was<br/>     2 marked for identification.)</p> <p>3 BY MR. DALY:</p> <p>4 Q. Mr. Scully, I'm handing you what<br/>     5 apparently the government did not properly serve on<br/>     6 the Florida qui tam, which is a copy of your CV,<br/>     7 resume that was, I think, provided to us by<br/>     8 Mr. Gobena last week. Is that indeed your current<br/>     9 resume?</p> <p>10 MS. MILLER: Objection to form.</p> <p>11 Clarification. It wasn't the government that failed<br/>     12 to produce said documents. It was the Mylan<br/>     13 defendants who failed to produce said documents.</p> <p>14 MR. GOBENA: I'm confused by her<br/>     15 objection.</p> <p>16 MR. DALY: I didn't have an objection.</p> <p>17 MS. MILLER: It was the Mylan defendants<br/>     18 and the other defendants who failed to produce the<br/>     19 documents. It wasn't the government who was required<br/>     20 to produce the documents.</p> <p>21 MR. ESCOBAR: I'm Phil Escobar on behalf<br/>     22 of the Mylan defendants. You say that you're</p>   | <p>1 was from Abbott Labs. We provided -- asking for the<br/>     2 resume. We provided it to you, so there is nothing<br/>     3 improper that we did in terms of nonservice.</p> <p>4 BY MR. DALY:</p> <p>5 Q. I don't think so either, but I -- at least<br/>     6 in terms of this resume.</p> <p>7 MR. GOBENA: Fair enough.</p> <p>8 THE WITNESS: Hopefully, there is nothing<br/>     9 bad on my resume. I'd hate to be in the Joe Biden<br/>     10 camp here.</p> <p>11 BY MR. DALY:</p> <p>12 Q. So this is indeed a copy of your current<br/>     13 resume, Mr. Scully?</p> <p>14 A. I think so. It looks like it is.</p> <p>15 Q. Okay. Now, after you left CMS in January<br/>     16 of '04, you went to work for Alston &amp; Bird?</p> <p>17 A. Simultaneously Welsh Carson and Alston &amp;<br/>     18 Bird.</p> <p>19 Q. And you're still at Alston &amp; Bird?</p> <p>20 A. Yes.</p> <p>21 Q. And what do you do there?</p> <p>22 A. I started the health care practice, and I</p>   |

14 (Pages 50 to 53)

Henderson Legal Services  
 202-220-4158

Scully, Thomas A.

May 15, 2007

Washington, DC

| Page 94  | Page 96  |
|--|--|
| <p>1 that I was asked, but I would be more than happy to<br/>2 go do that.</p> <p>3 Q. This will be Exhibit Abbott 182.<br/>4 (Exhibit Abbott 182 was<br/>5 marked for identification.)</p> <p>6 BY MR. DALY:</p> <p>7 Q. Mr. Scully, I've handed you what we've<br/>8 marked as Exhibit Abbott 182, which is the Notice of<br/>9 Deposition for your deposition today, along with a<br/>10 subpoena duces tecum, and I'm just wondering if<br/>11 you've ever seen this before?</p> <p>12 A. I have not.</p> <p>13 MR. GOBENA: I'll represent, actually,<br/>14 that we did send a copy to Mr. Scully. And just so<br/>15 we don't have to revisit this issue later on.</p> <p>16 THE WITNESS: It's very possible it was<br/>17 sent to me, but I didn't see it. I'm frequently in<br/>18 New York and Washington and --</p> <p>19 BY MR. DALY:</p> <p>20 Q. I understand, and so just to --</p> <p>21 A. Probably was not a priority for my<br/>22 assistant.</p>  | <p>1 documents that might be responsive to these requests.<br/>2 A. Certainly will.</p> <p>3 Q. Thank you. And while I'm getting that<br/>4 exhibit, those documents, if they, if there are any<br/>5 that might be responsive would be located where?<br/>6 A. Almost certainly at my Alston &amp; Bird<br/>7 office in Washington.<br/>8 (Exhibit Abbott 183 was<br/>9 marked for identification.)</p> <p>10 BY MR. DALY:</p> <p>11 Q. Mr. Scully, I'm going to hand you what<br/>12 we've marked as Exhibit Abbott 183, which I believe<br/>13 is a copy of your September 21, 2001 written<br/>14 submission to the House Energy and Commerce<br/>15 Subcommittee. Is that what you recognize it to be?<br/>16 A. Yes.</p> <p>17 Q. And this is a document that you submitted<br/>18 in connection with your testimony on September 21,<br/>19 2001?</p> <p>20 A. Yes. Yes.</p> <p>21 Q. And just to give the process, this is the<br/>22 way it's typically done. In other words, if you're</p> |
| Page 95  | Page 97  |
| <p>1 Q. Oh, for your assistant. It was for you --<br/>2 A. For either of my assistants in my paying<br/>3 jobs. So I apologize.</p> <p>4 Q. And just keep that for a minute because I<br/>5 do want to ask -- and just to confirm, if you look on<br/>6 the second to last page under Exhibit A, you see a<br/>7 document request -- documents requested. I take it<br/>8 that you did not conduct any search at least up to<br/>9 now for the five categories of documents that are<br/>10 mentioned?</p> <p>11 A. I have not, but I can tell you the only<br/>12 one that's any issue is potentially number three,<br/>13 which is whether I have any personal documents.<br/>14 There is nothing, nothing else that would be -- would<br/>15 be relevant. It's possible I have some old<br/>16 documents, but I very much doubt it, but I would be<br/>17 happy to look, and I can show you.</p> <p>18 Q. Well, I guess I would ask then since<br/>19 you -- since you maybe didn't see it, even though it<br/>20 may have been sent to you, if you would conduct that<br/>21 search. And you know, confer with Mr. Gobena or<br/>22 others within DOJ, and let us know if you find any</p> | <p>1 going to testify before Congress, you come in and you<br/>2 give them a written statement, and then you go in and<br/>3 talk to them and answer questions. Is that the<br/>4 process?</p> <p>5 MR. GOBENA: Object to the form. Sorry.<br/>6 THE WITNESS: Yes.</p> <p>7 BY MR. DALY:</p> <p>8 Q. And okay, so you -- based on earlier<br/>9 testimony today, you started as a consultant in<br/>10 February or March of 2001, correct?</p> <p>11 A. Yes.</p> <p>12 Q. With CMS and then you were actually<br/>13 confirmed when?</p> <p>14 A. May, May 10th, I think, somewhere in<br/>15 there. Middle of May.</p> <p>16 Q. And so -- and is this the first testimony<br/>17 that you can recall before Congress on the issue of<br/>18 AWP and Medicare?</p> <p>19 A. On this issue, I think it probably was.<br/>20 I'm not certain.</p> <p>21 Q. In the first paragraph right in the middle<br/>22 on the second page, there is a sentence that says,</p>                                    |

Scully, Thomas A.

May 15, 2007

Washington, DC

| Page 98  | Page 100   |
|--|--|
| <p>1 "in addition, it is clear that the payment system for<br/>2 selected outpatient drugs that are now covered by<br/>3 Medicare is a mess." Do you see that language?<br/>4     A. Yes.<br/>5     Q. And did you believe at this point in time,<br/>6 September 2001, that Medicare was a mess?<br/>7     A. Yes.<br/>8         MR. GOBENA: Object to the form.<br/>9         THE WITNESS: Yes. You can imagine staff<br/>10 probably didn't write that.<br/>11         BY MR. DALY:<br/>12         Q. Pardon me?<br/>13         A. You can imagine staff probably didn't<br/>14 write that sentence.<br/>15         Q. This is actually you?<br/>16         A. Most likely.<br/>17         Q. Up at the top of the next page, page 2,<br/>18 you have part of a sentence that says, "the law<br/>19 mandates that we pay physicians and other providers<br/>20 based on the lower of the billed charge, or 95<br/>21 percent of the drug's average wholesale price." Do<br/>22 you see that language?</p>                               | <p>1 which Medicare payments are based are vastly higher<br/>2 than the amounts that drug manufacturers and<br/>3 wholesalers actually charge providers." Do you see<br/>4 that language?<br/>5     A. Yes.<br/>6     Q. And your numerous studies you're referring<br/>7 to, various OIG, Office of Inspector General reports<br/>8 that have been prepared over the years?<br/>9         MR. GOBENA: Object to the form.<br/>10         THE WITNESS: I don't remember, but there<br/>11 were many GAO, OIG, other private studies.<br/>12         BY MR. DALY:<br/>13         Q. Yes. I'm not asking you to remember any<br/>14 one in particular, but it's the OIG-GAO reports that<br/>15 you're referring to?<br/>16         A. A series of those.<br/>17         MR. GOBENA: Same objection.<br/>18         BY MR. DALY:<br/>19         Q. And a series of those going back at least<br/>20 10 years before your testimony here in September '01?<br/>21         MR. GOBENA: Objection, form.<br/>22         THE WITNESS: I think this was probably</p>  |
| Page 99  | Page 101   |
| <p>1     A. Yes.<br/>2     Q. And that was the result of the 2000<br/>3 Balanced Budget Act, or that was BBA, wasn't it?<br/>4         MR. GOBENA: Object to the form.<br/>5         THE WITNESS: I don't recall, but I assume<br/>6 you're correct.<br/>7         BY MR. DALY:<br/>8         Q. Well, this is the result of legislation<br/>9 that was passed by Congress in 2000 that set the<br/>10 reimbursement at 95 percent of AWP or the billed<br/>11 charge, correct?<br/>12         MR. GOBENA: Object to the form. I think<br/>13 you mean '97, Jim.<br/>14         THE WITNESS: I think it was 2000 that<br/>15 prohibited us from revisiting it for a year, if I<br/>16 remember correctly. So we couldn't revisit it until<br/>17 GAO came out with a report. I think the actual<br/>18 structure came from '97.<br/>19         BY MR. DALY:<br/>20         Q. Okay. And in the next sentence, you talk<br/>21 about "numerous studies have indicated that the<br/>22 industry's reported wholesale prices, the data on</p> | <p>1 written by staff, so I can't remember specifics.<br/>2         BY MR. DALY:<br/>3         Q. So this sentence -- well, strike that.<br/>4 You said that the Medicare being a mess sentence on<br/>5 the first page, that you wrote that, right?<br/>6         MR. GOBENA: Object to the form.<br/>7         THE WITNESS: The process of this<br/>8 testimony -- I testified a lot -- was a week before I<br/>9 met with a couple of staff people. And I would tell<br/>10 them what I want to say, and they would write it.<br/>11 And then just before I went to the Hill, I would put<br/>12 in a few things to spice it up, you can usually see<br/>13 which is mine, which is not.<br/>14         BY MR. DALY:<br/>15         Q. So, but my point is that you review -- you<br/>16 reviewed this document before it was submitted to<br/>17 Congress?<br/>18         A. Probably not that thoroughly, but yes, I'm<br/>19 sure I viewed it.<br/>20         Q. Skipping down a sentence, you have a<br/>21 sentence here that says -- still staying on page 2 --<br/>22 "some affected physicians and providers have</p> |

Scully, Thomas A.

May 15, 2007

Washington, DC

|  |   |
|--|---|
| <p style="text-align: right;">Page 102</p> <p>1 suggested that they need these Medicare drug profits<br/>   2 to cross-subsidize what they believe are inadequate<br/>   3 Medicare payments for services related to furnishing<br/>   4 the drugs such as the administration of chemotherapy<br/>   5 for cancer." Do you see that language?</p> <p>6     A. Yes.</p> <p>7     Q. And you were aware during this time period<br/>   8 that that was the contention of many providers,<br/>   9 correct?</p> <p>10    MR. GOBENA: Object to the form.</p> <p>11    THE WITNESS: I was aware that that was<br/>   12 primarily the contention of oncologists.</p> <p>13    BY MR. DALY:</p> <p>14    Q. And the convention was that the<br/>   15 oncologists were using the overpayment on the<br/>   16 Medicare Part B drugs to cross-subsidize inadequate<br/>   17 service payments under Medicare, is that your<br/>   18 understanding?</p> <p>19    MR. GOBENA: Object to the form.</p> <p>20    THE WITNESS: That was their contention.</p> <p>21    Yes.</p> <p>22    BY MR. DALY:</p>  | <p style="text-align: right;">Page 104</p> <p>1                 BY MR. DALY:<br/>   2     Q. Is your understanding different than that<br/>   3 today?<br/>   4     A. At the time, I think I believed that that<br/>   5 was basically the -- under the rules, that was what<br/>   6 CMS had used and then we had very little ability to<br/>   7 change that without a full rule making.<br/>   8     I'm not sure in hindsight if that was<br/>   9 correct, but my understanding at the time was, with<br/>   10 staff, that we would have to undergo full rule making<br/>   11 to change that. And that essentially the Red Book<br/>   12 was the de facto price that was used by the carriers<br/>   13 and CMS to pay 95 percent AWP.</p> <p>14    Q. What I'm trying to get to is whether or<br/>   15 not it's your understanding that as a general<br/>   16 proposition, manufacturers submit AWP to the<br/>   17 compendia, or they submit some other price to the<br/>   18 compendia, which the compendia then marks up to<br/>   19 achieve the AWP?</p> <p>20    MR. GOBENA: Object to the form.</p> <p>21    THE WITNESS: My understanding was that<br/>   22 the manufacturers subject a price to the Red Book,</p> |
| <p style="text-align: right;">Page 103</p> <p>1     Q. And you understood that to be their<br/>   2 contention?</p> <p>3     A. I certainly understood that to be their<br/>   4 contention. Yes.</p> <p>5     Q. If you skip ahead to page 4. Do you see<br/>   6 under Medicare payment for currently covered drugs in<br/>   7 the second sentence, you say, "traditionally, AWP has<br/>   8 been based on prices reported by drug manufacturers<br/>   9 and published in compendia, such as the Red Book,<br/>   10 which is published by Medical Economics Company,<br/>   11 Inc."</p> <p>12     Do you see that language?</p> <p>13     A. Yes.</p> <p>14     Q. I just want to ask you a couple of<br/>   15 questions about that. Is it your understanding that<br/>   16 manufacturers actually report AWP?</p> <p>17     MR. GOBENA: Object to the form.</p> <p>18     THE WITNESS: It was my understanding at<br/>   19 this time that manufacturers basically self-reported<br/>   20 to the Red Book, which is then used as AWP as the<br/>   21 standard measurement, as a reference matter for most<br/>   22 of the carriers.</p> | <p style="text-align: right;">Page 105</p> <p>1     which is then published as the compendia. That they<br/>   2 submit it. That was my understanding. It may not be<br/>   3 correct.</p> <p>4     BY MR. DALY:</p> <p>5     Q. All right. So at this point in time, and<br/>   6 perhaps now, you do not have an understanding that<br/>   7 manufacturers submit a list price or direct price or<br/>   8 WAC or some other price, and that the compendia then<br/>   9 marked that price up by a percentage and lists that<br/>   10 as the AWP?</p> <p>11     MR. GOBENA: Object to the form.</p> <p>12     MS. MILLER: Object to the form.</p> <p>13     THE WITNESS: I was not -- my<br/>   14 understanding was that they submitted the AWP to the<br/>   15 Red Book.</p> <p>16     BY MR. DALY:</p> <p>17     Q. And was it your understanding that the,<br/>   18 that the AWP that CMS was using as the benchmark for<br/>   19 reimbursement was the AWP that was published in the<br/>   20 compendia?</p> <p>21     A. For the most part, it was my understanding<br/>   22 that the standard practice was that 95 percent of AWP</p>  |

27 (Pages 102 to 105)

Henderson Legal Services  
 202-220-4158

Scully, Thomas A.

May 15, 2007

Washington, DC

| Page 106   | Page 108  |
|--|---|
| <p>1 was the AWP that was published in the Red Book.<br/>     2 Q. And that's what you understood the law and<br/>     3 regulations to require?<br/>     4 A. That's what I understood at the time. At<br/>     5 the time, that's what I believe the law and<br/>     6 regulations required. It's my recollection. I<br/>     7 probably knew it better at the time than I do now.<br/>     8 Q. In the next paragraph, you state, "this<br/>     9 committee," which is the Energy and Commerce<br/>     10 Committee, "CMS and the OIG have long recognized the<br/>     11 shortcomings of AWP as a way for Medicare to<br/>     12 reimburse for drugs." Do you see that language?<br/>     13 A. Yes.<br/>     14 Q. And you had been aware of the shortcomings<br/>     15 of AWP as a way for Medicare to reimburse drugs since<br/>     16 your work on this in '90-'91 as we discussed this<br/>     17 morning, correct?<br/>     18 MR. GOBENA: Object to the form.<br/>     19 MR. BREEN: Object to the form.<br/>     20 BY MR. DALY:<br/>     21 Q. Go ahead.<br/>     22 A. Yes. Generally, I was aware.</p> | <p>1 sentence that says, "by offering physicians and<br/>     2 providers deep discounts compared to the price they<br/>     3 could bill Medicare, the drug manufacturers are able<br/>     4 to use profit margins to manipulate physicians and<br/>     5 providers to use their products for Medicare<br/>     6 beneficiaries." Do you see that language?<br/>     7 A. Yes.<br/>     8 Q. And is that something you believed at the<br/>     9 time?<br/>     10 A. Something I still believe.<br/>     11 Q. You're aware of how generic drugs are<br/>     12 reimbursed under Medicare, correct?<br/>     13 A. Yes.<br/>     14 Q. In the sense that if there are multiple<br/>     15 source drugs, they are typically reimbursed under a J<br/>     16 Code, correct?<br/>     17 A. Yes.<br/>     18 Q. And the J Code is typically the median AWP<br/>     19 between all of the participants in the J Code,<br/>     20 correct?<br/>     21 MR. GOBENA: Object to the form.<br/>     22 THE WITNESS: Yes.</p>                     |
| Page 107   | Page 109  |
| <p>1 Q. And in the next sentence, you say, "the<br/>     2 IG," that's the Inspector General, "has published<br/>     3 numerous reports showing that true market prices for<br/>     4 the top drugs billed to the Medicare program by<br/>     5 physicians, independent dialysis facilities and DME<br/>     6 suppliers are actually significantly less than the<br/>     7 AWP reported in the Red Book and like publications."<br/>     8 Do you see that language?<br/>     9 MR. GOBENA: Object to the form.<br/>     10 THE WITNESS: Yes.<br/>     11 BY MR. DALY:<br/>     12 Q. And the numerous reports referred to here<br/>     13 are the various OIG reports that you had been<br/>     14 familiar with during this time period, correct?<br/>     15 MR. GOBENA: Object to the form.<br/>     16 MR. BREEN: Object to the form.<br/>     17 THE WITNESS: Yes. I think GAO is one.<br/>     18 BY MR. DALY:<br/>     19 Q. GAO reports as well?<br/>     20 A. GAO as well.<br/>     21 Q. If you go over to -- we are on page 5 now,<br/>     22 in the carryover paragraph at the top. You have a</p>       | <p>1 BY MR. DALY:<br/>     2 Q. Is that your understand --<br/>     3 A. Generally.<br/>     4 Q. Okay. And so if you have, I mean, five<br/>     5 participants in a J Code, five different brands of a<br/>     6 particular drug that are captured within a single J<br/>     7 Code, if a provider were to use that J Code, the<br/>     8 provider would put in whatever the J Code median is<br/>     9 for that J Code, correct, as his reimbursement?<br/>     10 MR. GOBENA: Object to the form.<br/>     11 MR. BREEN: Objection to the form. Breen,<br/>     12 objection, form.<br/>     13 MR. GOBENA: And Gobena, objection, form.<br/>     14 THE WITNESS: I'm generally familiar with<br/>     15 it.<br/>     16 BY MR. DALY:<br/>     17 Q. And is what I said generally correct?<br/>     18 MR. GOBENA: Object to the form.<br/>     19 THE WITNESS: I believe so. Yes.<br/>     20 BY MR. DALY:<br/>     21 Q. So that I just want to understand in terms<br/>     22 of what you wrote here, if you're within a J Code,</p> |

28 (Pages 106 to 109)

Henderson Legal Services  
 202-220-4158

Scully, Thomas A.

May 15, 2007

Washington, DC

| Page 194  | Page 196  |
|---|---|
| <p>1 that is that you create provider access issues where<br/>     2 some providers can't get the drug for the price<br/>     3 you've set it at. Is that correct?</p> <p>4 MR. GOBENA: Object to the form.</p> <p>5 Mischaracterizes the witness's testimony.</p> <p>6 THE WITNESS: My concern would be the<br/>     7 opposite. You can create 2 percent of AWP and AWP is<br/>     8 a completely invented number, so it's 2 percent of<br/>     9 whatever number you make up.</p> <p>10 So my experience if you charge 85 percent<br/>     11 of AWP versus 95 percent of AWP, all people do is<br/>     12 raise the AWP, because it's not a real number. It's<br/>     13 a completely contrived number. And you can multiply<br/>     14 any number you want by AWP, because it's not a number<br/>     15 and never has been for the vast bulk of<br/>     16 manufacturers.</p> <p>17 BY MR. DALY:</p> <p>18 Q. Are you saying that you didn't tell<br/>     19 Congress under oath that dropping the percentage of<br/>     20 AWP would cause provider access problems?</p> <p>21 A. Temporarily, if you paid 95 percent AWP<br/>     22 one month and 85 percent the next, before people were</p>  | <p>1 looked at adopting AMP and other things which were<br/>     2 much more appropriate. But average wholesale price<br/>     3 is a number that's created for exactly this purpose,<br/>     4 so that the government will pay a percentage of it.</p> <p>5 BY MR. DALY:</p> <p>6 Q. And in 2000 -- I'm sorry, in 1991-'92, the<br/>     7 first Bush Administration proposed that reimbursement<br/>     8 be reduced to 85 percent of AWP, correct?</p> <p>9 A. Yes.</p> <p>10 Q. And I think as you mentioned, the program<br/>     11 memoranda that we are looking at ran into political<br/>     12 issues with Congress, and in fact, the directive to<br/>     13 the carriers to not use these DOJAWPs for<br/>     14 reimbursement purposes was retracted, is that<br/>     15 correct?</p> <p>16 MR. GOBENA: Object to the form.</p> <p>17 THE WITNESS: I believe particularly in<br/>     18 years that are rounded by fours, particularly<br/>     19 September, October and November, it's difficult to<br/>     20 make tough policy calls.</p> <p>21 BY MR. DALY:</p> <p>22 Q. So was -- does that mean that the program</p> |
| Page 195  | Page 197  |
| <p>1 able to jack up the prices, they would provide<br/>     2 provider access problems in the short term.</p> <p>3 But the reality is AWP is, as I've said<br/>     4 repeatedly, is air. AWP is to me a completely --<br/>     5 it's nobody's fault, it's a stupid policy, but AWP is<br/>     6 a self-reported number and you could multiply 85<br/>     7 percent of whatever number you felt like making up.<br/>     8 And that's what happened. So in the short term,<br/>     9 quarter by quarter, maybe even for six months until<br/>     10 people adjusted, it could have provided access<br/>     11 problems. But in the long run, the problem with AWP<br/>     12 was AWP itself, no matter what your multiplier was.</p> <p>13 Q. To use your example, if after<br/>     14 reimbursement was cut to 85 or 80 percent of AWP and<br/>     15 then the AWP did not get raised, then the provider<br/>     16 access problems would persist?</p> <p>17 MR. GOBENA: Object to the form.</p> <p>18 THE WITNESS: In theory, possibly, but I<br/>     19 never -- in reality, nobody ever kept -- it just<br/>     20 never happened. 80 percent of AWP -- AWP was a<br/>     21 number that was self-reported and made up. So I<br/>     22 mean, that's why we obviously didn't adopt AWP. We</p> | <p>1 memorandum was withdrawn?</p> <p>2 A. I believe that the program memorandum was<br/>     3 never actually carried out in a meaningful way.</p> <p>4 (Exhibit Abbott 185 was<br/>     5 marked for identification.)</p> <p>6 BY MR. DALY:</p> <p>7 Q. And I'll hand you what's been marked<br/>     8 Abbott Exhibit 85. I'm sorry. Exhibit Abbott 185.<br/>     9 And this appears to be a program memorandum from CMS<br/>     10 to the carriers directing them not to use the AWPs.<br/>     11 And my question is, is that what you recognize this<br/>     12 document to be?</p> <p>13 A. Yes. I'm not sure I was administrator at<br/>     14 this point. It may have been before I was confirmed,<br/>     15 but yes, I'm sure that's what it is.</p> <p>16 Q. That was sometime in May that you were<br/>     17 confirmed, May of '01, right?</p> <p>18 A. Yes.</p> <p>19 Q. And prior to that, you said you'd be<br/>     20 working as a consultant?</p> <p>21 A. Yes.</p> <p>22 Q. And when you say as a consultant, were you</p>  |

50 (Pages 194 to 197)

Henderson Legal Services  
 202-220-4158